

Report on Committee on Personal Injuries 2018

1. Introduction

This has been a very busy year for this Committee. We have had to make submissions to the Law Reform Sub-Committee for Periodical Payments, Interim Report. We were not consulted on the Third Party Funding for Arbitration and Mediation enactment legislation, and as such, we have had to put in dissenting reports upon its application to all types of personal injuries cases. Our concerns about it being applied to Mediation without proper consultation have been understood by the Solicitor General, and Third Party Funding for Mediation Legislation has not been enacted. This is the latest news. So thank you members for your support on this topic.

2. Periodical Payments for the more serious injury cases

Basically the committee was in favour of the introduction of compulsory periodical payments for the more serious cases which require constant care into the future. This would take the “hit or miss” approach of the amounts provided being too much, but mostly not enough, as the victims in these cases were living longer as care regimes improve. We were concerned the entity which would manage these cases, should be financially reliable and credible. The Law Reform Sub Committee had not thought enough about this aspect. Since most of the insurers involved in these cases were not conducting “long term business”, and therefore would pay off the claim to a third entity. It was therefore better that a properly managed “third entity” or Fund be managed by the insurers, to ensure there was suitable long term funding for these cases. We thought that a court initiated periodical payment award would cut out some, if not all the claims touts, who would only want a cut out of a large fixed payment, rather than “trailer commission” spread out over the life of the subject of the award.

3. Third Party Funding for Arbitration and Mediation

This sub-committee had not been consulted, whereas the Arbitration and Mediation Committees had been. Our objection to this piece of legislation is for 40 plus years the Department of Justice, (DOJ) and the Judiciary has frowned on maintenance and champerty. This new legislation now abolishes these offences in so far as they may apply to arbitration and mediation, and the DOJ only proposes a Code of Conduct to regulate the providers of Third Party Funding, without reference to personal injury cases of all classes. We believe this is a retrograde step, and the main legislation should make it clear that these offences are only abolished where the obligations under dispute arise out of consensual contracts, and do not arise out of accidents causing personal injury of all kinds. We have in mind additional claims under the Fatal Accidents Ordinance, Cap. 22 and the Law Amendment (Reform and Consolidation) Ordinance. Cap 23 We have worked closely with the Law Society Personal Injury Committee on this subject and continue to do so, and will make further representations to the Secretary for Justice to ensure the legislation does not apply to personal injuries in the future. We may need to amend the Personal Injuries Practice Directions to ensure that if Third Party Funding applies to Mediation, that the system is not abused by claims touts.

4. Low Levels of Insurance for Third Party Claims for Buildings

It has come to our attention that there are very low and non-existent compulsory insurance levels set by the Regulations issued under the Building Maintenance Ordinance Cap. 344. For personal injuries it is HK \$10 million for any one event, and for damage to third parties no cover is required. Seeing one half of Hong Kong “s population pass through a multi-storey part of a building in the morning, and return through the same passages, walkways and lifts in the evening, this is a regrettable situation. Seeing as there are 40,000 ageing multi-storey buildings in Hong Kong, these levels of compulsory insurance are unacceptable. This has also been highlighted in last year’s inundation of the car park at Heung Fa Tsuen in the typhoon in August. We have had big and disastrous fires in the past, at the Garley Building, Top One Karaoke, and the Cipel Marco Factory in which many people have died or been seriously injured. The Grenfell Tower incident in London illustrates the unfortunate potential for multi-storey buildings to burn out of control. This was aptly demonstrated by the fire at the Cheong Fat Factory Building which burned for nearly 2 weeks in Ngau Tau Kok.

5. Low Levels of Marine Insurance Coverage in Hong Kong Waters and the lack of a Marine Insurers’ Bureau to provide immediate relief in Marine Accidents (- a marine MIB and TAVAS Scheme)

Unfortunately, in a bid to harmonize our marine legislation with that of the PRC in 2004 the administration reduced the coverage for personal injury accidents on “small vessels” from HK \$3 million to HK \$260,000 per passenger for all marine vessels in Hong Kong under 300 tonnes. There is no equivalent of the Motor Insurers’ Bureau to pay out under reserved claims or cases where smugglers hit swimmers or have accidents at piers (as has happened in the recent past). These vessels do not carry any identification marks, and thus no claims can be pursued against them. We aim to promote this suggestion as a “Marine MIB” could be set up with the assistance of the MIB and others, to remedy these lacunae.

6. Discussions about the low levels of “relief payments” and the administrative obstacles placed in the way of bona fide claimants who need assistance under the Employees’ Compensation Assistance Board Ordinance. Cap

Mark Reeves and myself have twice been to the Department of Labour and Welfare to discuss the unfortunate obstacles placed by the Board for claimants by requiring the bankruptcy or the winding up of an insolvent company, and then proceeding to judgment, first before being able to apply for the payment of an employees compensation award, or for a relief payment. The decision in the Final Court of Appeal – an unusually opaque judgment given by Lord Hoffman has not helped the situation. The fact is that so called relief payments have not been adjusted since 2002, although the Board is now very well funded, having nearly 1 Billion of reserves. We have had a meeting with the Secretary of Labour and Welfare who promised to look into the situation, so far without result.

7. Conclusion

I would like to thank members of the Committee for their deep thoughts and insight into these often difficult questions, and the contributions from Ruy Barretto SC, Raymond Leung SC, Christina Lee and Ashok Sakhrani have been illuminating and contributed to well rounded proposals which might have foundered had I been the sole author of them. Lastly I thank Eric Tsoi for his communication skills in keeping everyone informed during this very busy year. These have ensured that our voices have been heard, especially on the Third Party Funding in Mediation issue.

Membership:

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